Essay: When Less Is More—Can Reducing Penalties Reduce Household Violence?

Virginia E. Hench*

The weapons of choice are fists, hands, feet, telephones, knives, and thrown objects.[1]

I. INTRODUCTION

In Hawai'i today, we are in relatively little danger of violent crime on the streets, but for the one Hawai'i woman in five who has been violently assaulted in her home, our low street crime rate is cold comfort.[2] Every twenty-eight days, a woman in Hawai'i is murdered by her present or former husband or partner; three out of four are murdered *after* they leave their abuser. Attacks on household members are more common than attacks on strangers, and the injuries inflicted are far more serious than injuries sustained in attacks by strangers.[3] Shocking as they are, the statistics do not tell the whole story, since much household violence goes unreported.[4] The FBI estimates conservatively that only one in ten incidents of household violence is reported; some experts believe that reported abuse is as low a percentage as one in one hundred attacks.[5]

 Assistant Professor, The William S. Richardson School of Law, University of Hawai'i, Mānoa. Professor Hench was a member of the Committee to Conduct Comprehensive Review of the Hawai'i Penal Code which drafted the proposed amendments to Hawai'i's Penal Code addressed in this Essay.

[1] Marilyn Kim, *No Way Out*, HONOLULU MAGAZINE, Sept. 1995, at 48, 56; League of Women Voters and Hawaii State Commission on the Status of Women, REPORT: DOMESTIC VIOLENCE FAMILY COURT MONITORING PROJECT (Sept. 1996) [hereinafter REPORT] (on file with the author).

[2] Kim, *supra* note 1, at 48, 56. *See* REPORT, *supra* note 1, at Summary (unpaginated). In Hawai'i, from 1985 through 1994, nearly 30% of all homicides in the state arose out of domestic violence, compared with 15% nationally in 1994. *Id.*

[3] Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1134 n.10 (1994). *See also* Carolyn M. Sampselle et al., *Violence Against Women: The Scope and Significance of the Problem*, *in* VIOLENCE AGAINST WOMEN: NURSING RESEARCH, EDUCATION, AND PRACTICE ISSUES 3, 8 (Carolyn M. Sampselle ed., 1992) (family violence affects all economic classes).

[4] Welch, *supra* note 3, at 1135. REPORT, *supra* note 1, at Summary (unpaginated) (only a small fraction of abuse is reported to police; by the time an arrest is made, abuse is likely to have been going on for years).

[5] *Calling Police Protects Abused Wives, Report Says*, N.Y. TIMES, Aug. 18, 1986, at A9.

Household violence is the number one health risk for women today.[6] It is also a risk to our society at large. As Attorney General Janet Reno has pointed out, "If we don't stop violence in the home, we are never going to stop it on the streets of America."[7] Household violence is the primary source of crime for virtually every major social problem Hawai'i faces today, from child abuse, juvenile delinquency, gang activity, alcoholism and drug abuse, to rape, robbery, home invasion, and murder.[8] These problems touch all of us in some way, and they are growing.

It is a fact that children who grow up in violent homes, even if they are not abused themselves, commit three times the serious crimes than those who did not grow up in such violent homes.[9] The children of these violent homes are six times more likely to attempt suicide, 24 percent more likely to commit sexual assaults, 74 percent more likely to commit other crimes against the person, and 50 percent more likely to abuse drugs and alcohol.[10] A Hazleton Foundation study documented that 63 percent of young men between the ages of 11 and 20 now doing time for homicide have killed their mothers' batterer.[11]

For girls, violent homes are likely to lead to becoming teenage prostitutes, runaways, and having babies at far too young an age.[12] Not only do the babies of these girls from violent homes tend to recreate the cycle of their mothers'

---

[6] Former Surgeon General C. Everett Koop identified family violence as the leading health risk to women today, causing more injuries than automobile accidents, muggings and rapes combined. Joan Zorzo, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 46 (1992). Between 1.8 and 6 million women a year are assaulted or killed by men with whom they have been intimately involved. Jan Hoffman, *When Men Hit Women*, N.Y. TIMES MAG., Feb. 16, 1992, §6 at 25; Martha Shirk, *Domestic Violence is a Leading Hazard for Women*, ST. LOUIS POST-DISPATCH, May 6, 1992, at 10A. *See also* Angelo Bruscas, *Athletes Cross the Line: Simpson Not Only One With Record of Domestic Violence*, SEATTLE POST-INTELLIGENCER, June 23, 1994, at A1 (family violence is the number one cause of homicidal death in women).

[7] *Symposium: A Leadership Summit; The Link Between Violence and Poverty in the Lives of Women and Their Children*, 3 GEO. J.F.P. 5, 5 (Fall 1995) (keynote speech of Attorney General Janet Reno).

[8] Sarah Buel, *Dealing With Family Violence Through Community Partnerships*, Audio Tape of Plenary Session, held by A.P.P.A. 19th Annual Training Institute (Sept. 11-14, 1994) (on file with the author) [hereinafter Buel Tape].

[9] Welch, *supra* note 3, at 1136-37, n.29. *See* MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 3, 122 (1980). *See* Helen Rubenstein Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 708 (1989) (relating links between poverty, social isolation, race, age, and family abuse).

[10] Buel Tape, *supra* note 8.

[11] *Id.*

[12] *Id.* (commenting on a study at the University of Washington which has documented the number one common factor among pregnant teens is that they grew up in a violent household).

lives, they now represent 92 percent of the convicted felons between the ages of 19 and 34.[13] The cycle repeats, as about one out of every four children of the most violent households uses at least some physical force on his spouse in any given year;[14] one in ten of the husbands who grew up in violent families seriously injure their family and household members,[15] over three times the rate for men who did not grow up in such violent homes.[16] By cutting off the recurring generational cycle of violence in the family, we can also cut off the primary cause of drug addiction, alcoholism, juvenile delinquency and gang activity.[17]

In the first seven years after Hawai'i first enacted Hawaii Revised Statutes ("H.R.S.") section 709-906, Abuse of Family and Household Members,[18] only three batterers were convicted.[19] Only one of the three was sentenced to jail time, and his sentence was suspended.[20] Section 709-906 was amended on May 25, 1985 to require the present mandatory minimum sentence of 48 hours in jail,[21] but it also provided for the optional one-year sentence which has caused backlogs and resulted in many batterers going free.[22] Under present law, a first offense of abuse of family and household members without serious physical injury is classified as a full misdemeanor,[23] carrying a possible one year jail sentence,[24] which automatically triggers the constitutional right to a

---

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] STRAUS, *supra* note 9, at 150-51; William J. Goode, *Force and Violence in the Family*, 33 J. MARRIAGE & FAM. 624, 633 (1971).

[17] STRAUS, *supra* note 9, at 121-22; Robert Geffner & Alan Rosenbaum, *Characteristics and Treatment of Batterers*, 8 BEHAV. SCI. & L. 131, 132 (1990); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 63 (1984).

[18] REPORT, *supra* note 1, at 4.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *See id.* at 6.

[23] HAW. REV. STAT. § 709-906(5) (abuse of family or household member) and HAW. REV. STAT. § 709-906(4) (refusal to comply with lawful order of a police officer) are full misdemeanors. *See* text of HAW. REV. STAT. § 709-906, *infra* Appendix D. HAW. REV. STAT. § 586-4 (violation of temporary restraining order) and HAW. REV. STAT. § 586-11 (violation of a domestic abuse order for protection) are also full misdemeanors. *See* text of HAW. REV. STAT. § 586-11, *infra* Appendix D.

[24] HAW. REV. STAT. § 706-663 (1993). It provides:

> After consideration of the factors set forth in sections 706-606 and 706-621, the court may sentence a person who has been convicted of a misdemeanor or a petty misdemeanor to imprisonment for a definite term to be fixed by the court and not to exceed *one year in the case of a misdemeanor* or *thirty days in the case of a petty misdemeanor.*

Id. (emphasis added).

jury trial under both the Hawai'i and United States Constitutions.[25] Defendants charged under the present law ask for jury trials because jury trials are inherently more expensive and time-consuming than bench trials.[26] With forty to fifty new cases coming into the system weekly,[27] courts quickly become backlogged,[28] resulting in as many as one-third of those charged with abuse of family and household members having their cases dismissed before trial because of the courts' backlogs.[29] In 92 percent of the cases that do go to trial, the jury acquits the defendant, in part because juries in domestic violence cases tend to blame the victim and exonerate the attacker.[30] (This is in stark contrast with other criminal cases, in which roughly 90 percent of those charged are convicted).[31]

Simple mathematics tell a shocking story: under our present misdemeanor law, of 100 men arrested for misdemeanor household violence, 66 will go to trial, and 61 will be acquitted. With such a high probability of acquittal at trial, few plead guilty.[32] For every 100 arrests resulting in charges filed, we bear the burden of 66 jury trials to get five convictions. The five who are convicted will be sentenced to approximately 48 hours. Most of those who

---

[25] *See* U.S. CONST. amend. VI; HAW. CONST. art. I, § 13. This right refers to the constitutional guarantee of jury trial in "serious" criminal cases; the right to jury trial does not apply in the case of "petty" offenses. *See, e.g.*, State v. Kasprzycki, 64 Haw. 374, 641 P.2d 978 (1982) (citing State v. Shak, 51 Haw. 612, 466 P.2d 422, *cert. denied*, 400 U.S. 930 (1970)) (defendant charged with petty misdemeanor subject to maximum sentence of thirty days confinement and/or fine is not entitled to jury trial).

> Under the Federal Constitution, the United States Supreme Court has held that two criteria are relevant in determining whether an offense is petty or serious. The first is whether the offense is by its nature serious. If so, the size of the penalty that may be imposed is only of minor relevance, and the right of trial by jury attaches . . . . If the offense is not by its nature serious, however, the magnitude of the potential penalty set for its punishment becomes important, since it is an indication of the ethical judgments and standards of the community.

51 Haw. at 614-15, 466 P.2d at 424 (citations omitted). Six months is the dividing line between serious and petty offenses. Baldwin v. New York, 399 U.S. 66, 70 (1970) (potential sentence exceeding six months' imprisonment is sufficiently severe to take offense out of the category of "petty"). *See also, e.g.*, Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974), *cited with approval in Kasprzycki*, 64 Haw. at 375, 641 P.2d at 979 (thirty day possible maximum sentence cannot trigger right to jury trial).

[26] Notes from Penal Code Commission deliberations (on file with the author) (comments of Office of the Public Defender). *See also infra* Appendix B (many cases dismissed because of backlog).

[27] *See infra* Appendix B.

[28] *See id.*

[29] *See id.*

[30] Notes from Penal Code Commission deliberations, *supra* note 26.

[31] *Id.*

[32] *Id.*

are sentenced will have served that time during their initial pre-trial detention,[33] so they will walk out of the courtroom free and clear. This is not the fault of the courts. The problem is simply that the sentencing range for a first offense is set at a level that triggers the right to jury trial.[34] As the Committee noted:

> As this comment is written, efforts are being made to reduce the number of household member abuse cases awaiting jury trials in O'ahu's family court, but every week occasions an average of 40 to 50 more jury trial demands. Existing and foreseeable judicial resources are inadequate to adjudicate these cases; in consequence, many cases are dismissed for want of speedy trials, pled to other charges in order to avoid the mandatory 48 hours. Defense counsel cannot be faulted for seeking jury trials in a system that guarantees jury trials. Nor can the Judiciary be faulted for giving priority to murder and other serious felony cases. Nor should the Legislature be faulted if it opts to solve the problem by reclassifying the crime so as to eliminate a penalty — on the books but never employed — that, because of sheer availability, triggers the right to jury trial.[35]

Clearly, something needs to be done. After more than a year of study, the Hawai'i Committee to Conduct Comprehensive Review of the Hawai'i Penal Code recommended a simple step toward stopping the violence that has become the serpent in our paradise: repealing the current section 709-906,[36] and enacting in its place a statute that would read, in pertinent part:

> § 709-912. Abuse of family or household members; penalty.
>
> (1) A person commits the offense of abuse of family or household members if the person intentionally, knowingly, or recklessly physically abuses a family or household member.
> (2) A person who commits the offense of abuse of a family or household member shall be sentenced as follows:
> (a) For a first offense, to a one-year term of probation with a mandatory condition of imprisonment of not less than forty-eight hours and not more than thirty days; and
> (b) For any subsequent offense which occurs within five years of a previous offense which resulted in a conviction under this section, to a one-year term of probation with a mandatory condition of imprisonment of not less than thirty days and not more than one year.[37]

---

[33] *Id.*

[34] *See infra* Appendix B.

[35] *Id.*

[36] *See* text of current HAW. REV. STAT. § 709-906 (abuse of family and household members), *infra* Appendix D.

[37] *See* text of proposed §§ 709-910 through 709-915 and Committee Commentary, *infra* Appendix A and B.

This essay recommends, as a first step, adoption of a proposal set forth in the Final Report of the Committee to Conduct Comprehensive Review of the Hawai'i Penal Code submitted to the Legislature of the State of Hawai'i.[38] This proposal, which has not yet been acted upon, would change the sentencing provisions of Abuse of Family and Household Member to reduce a first offense without serious injury from a full misdemeanor to a petty misdemeanor, thus eliminating the right to jury trial for those defendants.

This proposal is likely to be controversial; it generated significant discussion in the Committee, and this controversy will no doubt be reflected in the Legislature and the community at large. The most controversial of the proposed changes are those to the punishment provisions for section 709-912 (abuse of family and household member) and section 709-913(2) (refusal to comply with a police officer's order to leave). Opponents of this proposal argue fervently and sincerely that reclassification of first offenses to the petty misdemeanor level represents a failure to support the victims of domestic violence,[39] but as the Committee notes, "What better way to combat the problem we rightly deplore than with actual punishment administered promptly?"[40] The first step in attacking Hawai'i's crime problems at their roots is to adopt the Committee's recommendations and to enact section 709-912, which would eliminate the right to jury trial that exists under current section 706-663,[41] by eliminating the purely symbolic one-year sentencing option, retaining the 48 hour mandatory minimum prison sentence, and adding a

---

[38] Final Report of the Committee to Conduct Comprehensive Review of the Hawai'i Penal Code, [hereinafter FINAL REPORT], as submitted to the Eighteenth Legislature of the State of Hawai'i on December 28, 1994 (on file with the author). According to State Senator Ray Graulty's office, the revised Code has not yet been reported to the full Legislature for action. Telephone interview with Sen. Graulty's office (Sept. 9, 1996).

The Committee to Conduct Comprehensive Review of the Hawai'i Penal Code was created pursuant to the mandate of 1993 Haw. Sess. L., Act 284, § 2 at 525-26 (H.B. No. 741, H.D. 2, S.D. 2, C.D. 1). The Committee consisted of thirty members, including judges at the appellate, first, second, and third circuit courts; the district courts of the first circuit; representatives of the Adult Probation Division, the Department of the Attorney General of Hawai'i, the Department of Public Safety's Office of the Director, Special Services Division, and Hawai'i Paroling Authority; the Adult Mental Health Division of the Department of Mental Health; the William S. Richardson School of Law faculty; the Center for Youth Research; the Sex Abuse Treatment Center; the Domestic Violence Legal Hotline; the Honolulu Police Department; the Offices of the Prosecuting Attorney of the City and County of Honolulu and County of Maui; the Office of the Public Defender, and the private defense bar. Letter from Associate Hawai'i Supreme Court Justice Steven Levinson to the Honorable Norman Mizuguchi, December 28, 1994, at 1-2 (on file with the author).

[39] FINAL REPORT, *supra* note 38.

[40] *Id.*

[41] *See* text of HAW. REV. STAT. § 706-663, *supra* note 24.

mandatory one-year probation period. This essay explores some of the reasons for the Committee's proposed changes, the emotional responses these proposed changes have triggered, and why implementation of these changes would benefit Hawai'i.

II. THE PROPOSAL FOR CHANGE: INTERVENTION AT THE PETTY MISDEMEANOR STAGE

To discuss these issues rationally, it is important to be clear on what is being proposed. The proposed enactment will not apply to repeat offenses, or to cases involving serious injury; these matters will continue to be prosecuted as assaults under section 707-710 or section 707-711.[42] The proposed changes likewise would not reduce felony assault to a misdemeanor.[43] The amendments will apply solely to cases that do not rise to the felony assault levels of 707-710 and 711,[44] assuring that there are consequences for the very first offense. Ninety-five percent of the sentences imposed under section 709-906[45] are for the minimum 48 hours of imprisonment,[46] and the proposed amendments retain 48 hours of imprisonment as a mandatory minimum sentence.[47] In addition, the proposed law would add a one year mandatory probation,[48] which has the advantage of not triggering the right to jury trial.[49] Additionally, probation makes it possible for the system to provide supervision, counseling, and further penalties for any infraction.[50]

It is understandable that we are reluctant to label any abuse of a family or household member "petty." Symbolism is potent, and the word "petty" carries a lot of emotional baggage. Nevertheless, it is inexcusable to let our

---

[42] See *infra* Appendix B; *see* text of HAW. REV. STAT. §§ 707-710 (Assault in the First Degree) and 707-711 (Assault in the Second Degree), *infra* Appendix D.

[43] *See infra* Appendix B. By contrast, the Domestic Violence Advocacy Project in Chicago, Illinois, estimated that in 1987, about 90 percent of the domestic violence cases in Cook County were charged as misdemeanors, regardless of the severity of the injuries. Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 166-67 (1990).

[44] *See infra* Appendix B. *See* text of HAW. REV. STAT. §§ 706-710 and 706-711, *infra* Appendix D.

[45] *See* text of HAW. REV. STAT. § 706-906, *infra* Appendix D.

[46] REPORT, *supra* note 1, at 6 (most persons convicted under HAW. REV. STAT. § 709-906 receive only the mandatory minimum sentence of 48 hours in jail). *See* Notes from Penal Code Commission deliberations, *supra* note 26 (comments of Office of the Public Defender). *See also infra* Appendix B.

[47] *See infra* Appendix B.

[48] *See id.*

[49] *See id.*

[50] Notes from Penal Code Commission deliberations, *supra* note 26 (comments of Office of Public Defender). *See also infra* Appendix B.

squeamishness over terminology prevent us from enacting a powerful crime-fighting weapon. It is not the label that controls the availability of the jury trial, after all it is the availability of that never-invoked one-year sentence for first offenses without serious injury. Intervening at the petty misdemeanor stage would eliminate this stumbling block.[51]

If we can't bring ourselves to call this offense a "petty" misdemeanor, we can call it something else. One proposal before the Committee was to re-label what are now called petty misdemeanors and misdemeanors with the less emotionally-loaded terms "A and B misdemeanors."[52] So long as we cap the available sentence for this category of crime below the level where a jury trial is triggered, it does not matter what we call it.

III. THE FAILED REMEDIES OF THE PAST

A compelling argument for adopting the Committee's proposal is that the remedies of the past have failed to stem the problem.

A. Safety Orders

Hawai'i is in the forefront in making safety orders (also known as protective orders) accessible to victims of domestic violence.[53] Safety orders are enforceable in criminal courts and offer some protection,[54] but a safety order is not a magic bullet.[55] It cannot stop the batterer unless he believes that

---

[51] The Committee noted:

> Current law classifies all instances of these offenses as misdemeanors, even though the mandatory jail sentence for first offenders is only 48 hours. The committee proposes, in §§ 709-912 and 709-913, to specify the punishment for first offenders as "a one-year term of probation with a mandatory condition of imprisonment of not less than forty-eight hours and not more than thirty days."

Committee Commentary, *infra* Appendix B.

[52] Notes from Penal Code Commission deliberations, *supra* note 26 (comments of Office of the Public Defender).

[53] *See* Kim, *supra* note 1 (describing protective or safety orders). *See* text of HAW. REV. STAT. § 586-4 (Temporary Restraining Order), *infra* Appendix D.

[54] Lisa R. Beck, Note, *Protecting Battered Women: A Proposal for Comprehensive Domestic Violence Legislation in New York*, 15 FORDHAM URB. L.J. 999, 1014 n.87 (1987). *See* Buel Tape, *supra* note 9.

[55] Beck, *supra* note 54, at 1015. *See* Mary Lou Boland, Note, *Domestic Violence: Illinois Responds to the Plight of the Battered Wife - The Illinois Domestic Violence Act*, 16 J. MARSHALL L. REV. 77, 90 (1982) (discussing protective (or safety) orders in Illinois). Such an order directs the batterer to stay away from the home or victim and to refrain from further abusive conduct. *See, e.g.*, N.Y. FAM. CT. ACT § 842 (McKinney 1983 & Supp. 1994) (requiring a defendant to stay away from the person or premise or to refrain from verbal or physical violence).

he will be punished for violating it. If the courts lack the capacity to enforce them, safety orders are little more than a symbolic defense against household violence, and obtaining one may be the last act the victim ever takes on her own behalf.[56] Tragically, she may die with her safety order in hand.[57]

B. Mandatory Arrest

In the landmark Minneapolis Domestic Violence Experiment,[58] the Minneapolis Police Department and Professors Lawrence Sherman and Richard Berk found that arrest for household violence was the most effective deterrent to repeat incidents of battering.[59] Such findings led to the adoption of what are known as "mandatory arrest" policies, such as that in Hawai'i.[60]

---

[56] Kim, *supra* note 1. *See* Litsky, *supra* note 43, at 155 (state legislative response to family violence in the 1970s was "grossly inadequate"). *See also* Greg Anderson, Note, *Sorichetti v. City of New York Tells The Police That Liability Looms for Failure to Respond to Domestic Violence Situations*, 40 U. MIAMI L. REV. 333 (1985) (discussing a case which held that a protective order creates a "special relationship" between the protected party and the police, thereby providing the basis for police liability if the protected party is injured).

[57] *See* Kim, *supra* note 1, at 50 ("My daughter died with her protective order in her hand."). *See* REPORT, *supra* note 1, at 2-3 ("most domestic violence homicides occur when victims attempt to escape or to end the relationship . . . . Victims who testify in court or at probation hearings against their abusers risk threats, retaliation, and further abuse . . . . Most victims are killed when they try to flee their abusers"). *See* Abigail Trafford, *The Divorce Violence Link*, WASH. POST, June 21, 1994, § Z, at 6.

[58] *See* Lawrence W. Sherman & Ellen G. Cohn, *The Impact of Research on Legal Policy: The Minneapolis Domestic Violence Experiment*, 23 LAW & SOC'Y REV. 117, 117-19 (1989) (encouraging replication of Minnesota experiment in other cities); *see also* Lawrence W. Sherman and Richard A. Berk, *The Specific Deterrence Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984) (advocating adoption of Minnesota experiment by other jurisdictions).

[59] Sherman & Berk, *supra* note 58, at 261 (six months after police intervention, official and victim-based recidivism reports showed significantly less post-intervention violence where arrests were made than in cases where the batterer was simply ordered to leave).

[60] *See* Kim, *supra* note 1 (describing Hawai'i's mandatory arrest policy). *See* REPORT, *supra* note 1, at 4, which notes:

> The Hawai'i statute is a presumptive arrest law, which means that police officers may make an arrest in any apparent domestic abuse situation. Pursuant to General Order 91-4, internal police policies in all Hawai'i jurisdictions mandate an arrest when there is probable cause to believe abuse of a household member has occurred. During the last decade, enforcement of Section 709-906 has increased the number of domestic violence arrests from 300 in 1986 to 4,665 in 1995 (Honolulu Police Department figures). The 1995 figure means that police found at least probable cause, or facts and evidence sufficient for arrest, 4,665 times . . . .
>
> . . . .
>
> Police agencies are required to make arrests, gather initial evidence, file reports and refer cases to prosecutors . . . . Prosecutors are required to file charges, work with witnesses,

Arrest tells a batterer "that his behavior is a crime, that it must stop, that punishment will follow, and that it is sensible to secure treatment to avoid repeating the behavior."[61] Mandatory arrest policies require that in certain situations, police officers must treat the incident as any other assault and must arrest the assailant.[62]

It seems logical to assume that a mandatory arrest policy would be a panacea for the problem of household violence. In fact, however, mandatory arrest is a classic example of a "get tough" policy that has symbolic value with the electorate, but which can lead to a host of problems. Unfortunately, mandatory arrest statutes can lead to what is sometimes called the "dual arrest" problem, where both partners to a domestic dispute have injuries and accuse the other; an officer in such a case may have no choice but to arrest both parties, even if it appears that one was clearly the aggressor.[63] To avoid this potentially harsh result, many states have adopted permissive arrest policies which allow, but do not require, police to make an arrest without a warrant if they have probable cause.[64] Presumptive arrest statutes, by contrast, provide that the police shall arrest the abuser in certain defined circumstances, preserving some level of police discretion in determining whether a particular case fits within those circumstances.[65]

---

address issues of evidence, and prosecute cases in court . . . .
Id.

[61] Anthony Bouza, *Responding to Domestic Violence*, *in* WOMAN BATTERING: POLICY RESPONSES 191, 195 (Michael Steinman ed., 1991).

[62] Nicole M. Montalto, Note, *Mandatory Arrest: The District of Columbia's Prevention of Domestic Violence Amendment Act of 1990*, 8 J. CONTEMP. HEALTH L. & POL'Y 337, 344 (1992).

[63] Hoffman, *supra* note 6, at 26. The New Jersey statute, in an attempt to eliminate the "dual arrest" scenario, requires an officer in such a case to assess "the comparative extent of the injuries, the history of domestic violence (if any), and other relevant factors." N.J. STAT. ANN. § 2C:25-21(c)(2) (West Supp. 1993).

[64] *See, e.g.*, ALASKA STAT. § 12.25.030(b) (Supp. 1996) (warrantless arrest when spouse is victim); ARIZ. REV. STAT. ANN. § 13-3601(B) (Supp. 1994) (warrantless arrest on probable cause for felony or misdemeanor domestic violence); FLA. STAT. ANN. ch. 901.15(6), (7)(a) (Harrison 1985 & Supp. 1996) (warrantless arrest on probable cause for violating domestic protective order, with evidence of bodily harm or potential for further violence); IDAHO CODE § 19-603(6) (Supp. 1996) (warrantless arrest upon reasonable cause to believe arrestee assaulted spouse); 750 I.L.C.S. § 60/301 (1994) (warrantless arrest for crime or violation of protective order, on probable cause); MASS. GEN. LAWS ANN. 209A, § 6(7) (West Supp. 1996) (warrantless arrest on probable cause for felony or misdemeanor domestic violence, or violating restraining order); MONT. CODE ANN. § 46-6-311(2) (1996) (warrantless arrest on probable cause for domestic violence or assault upon family or household member); R.I. GEN. LAWS §§ 12-29-3(B), 15-15-5(A) (Supp. 1996) (permitting warrantless arrest on probable cause for felony or misdemeanor if failure to arrest could result in further violence).

[65] *See* Beck, *supra* note 54, at 1036. *See, e.g.*, ARK. CODE. ANN. § 5-53-101 (Michie 1993) (noting that "immediate intervention through arrest upon probable cause to protect the victim

Arrest alone, however, has never been shown to be an effective deterrent.[66] Follow-up studies to the Minneapolis study showed that unless arrest was part of a comprehensive program that actually resulted in convictions, arresting the batterers could be worse than useless — it could actually be harmful.[67] Professor Sherman, coauthor of the original Minneapolis report, did a similar study in Milwaukee, Wisconsin in which the batterer's employment status

---

from physical injury is one remedy which should be provided in this state as in other states."). In addition, Idaho law states that:

> [T]he legislature finds that a significant number of homicides, aggravated assaults, and assaults and batteries occur within the home between adult members of families . . . . Domestic violence can . . . be deterred, prevented or reduced by vigorous prosecution by law enforcement agencies and prosecutors and by appropriate attention and concern by the courts whenever reasonable cause exists for arrest and prosecution.

IDAHO CODE § 39-6302 notes (1993).

[66] *See* Richard A. Berk & Phyllis J. Newton, *Does Arrest Really Deter Wife Battery? An Effort to Replicate the Findings of the Minneapolis Spouse Abuse Experiment*, 50 AM. SOC. REV. 253 (1985) (discussing changes in California law and the results of a follow-up study of residents prone to family violence); Beck, *supra* note 54, at 1035-36. In Connecticut:

> Whenever a peace officer determines upon . . . information that a family violence crime . . . has been committed within his jurisdiction, he shall arrest the person or persons suspected of its commission . . . . The decision to arrest and charge shall not (1) be dependent on the specific consent of the victim, (2) consider the relationship of the parties or (3) be based solely on a request by the victim.

CONN. GEN. STAT. ANN. § 46b-38(b) (West Supp. 1994); *see also, e.g.*, D.C. CODE ANN. § 16-1031 (Supp. 1993) ("A law enforcement officer shall arrest a person if the law enforcement officer has probable cause to believe that the person: (1) Committed an intrafamily offense that resulted in physical injury . . . ."); KAN. STAT. ANN. § 22-2307 (Supp. 1993) ("[T]he officers shall make an arrest when they have probable cause to believe that a crime is being committed or has been committed."); NEV. REV. STAT. § 171.1225 (1991) (requiring officers to inform suspected victims of acts of domestic violence that "[i]f I have probable cause to believe that an act of domestic violence has been committed against you in the last 4 hours I am required, unless mitigating circumstances exist, to arrest immediately the person suspected of committing the act"); N.J. STAT. ANN. § 2C:25-21 (West Supp. 1993) ("[T]he law enforcement officer shall arrest the person who is alleged to be the person who subjected the victim to domestic violence . . . ."); OR. REV. STAT. § 133.055(2)(a) (1993) (noting that "the officer shall arrest and take into custody the alleged assailant or potential assailant"); R.I. GEN. LAWS § 12-29-3(B) (Supp. 1993) ("When a law enforcement officer responds to a domestic violence situation and has probable cause to believe that a crime has been committed . . . the officer shall arrest and take into custody the alleged perpetrator [in certain situations] . . . ."); V.I. CODE ANN. tit. 16, § 94 (1991) (noting that an officer "shall make an arrest without a warrant if the officer has probable cause to believe that a misdemeanor or felony involving domestic violence . . . has been committed").

[67] *See, e.g.*, Daniel Goleman, *Do Arrests Increase the Rates of Repeated Domestic Violence?*, N.Y. TIMES, Nov. 27, 1991, at C8 (disputing the value of arrest alone in deterring repeated abuse). The Omaha Experiment, one of six similar studies funded by the National Institute of Justice, also did not support the findings of the Minneapolis experiment as to the value of arrest alone as a deterrent. Franklin W. Dunford et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183, 204 (1990).

significantly affected the deterrent effect of arrest, a factor not considered in the original Minneapolis study.[68] Sherman concluded that the deterrent effect of arrest alone shown in Minneapolis was a statistical fluke related to the low unemployment rate in that city at the time the study was conducted.[69] Unemployed batterers, in contrast to the employed arrestees in the original Minneapolis study, were not significantly deterred by arrest alone.[70] As Sherman and Berk cautioned:

> [W]e favor a presumption of arrest; an arrest should be made unless there are good, clear reasons why an arrest would be counterproductive. We do not, however, favor requiring arrests in all misdemeanor domestic assault cases. Even if our findings were replicated in a number of jurisdictions, there is a good chance that arrest works far better for some kinds of offenders than others . . . . We feel it best to leave police a loophole to capitalize on that variation.[71]

Honolulu Police Chief Michael Nakamura has recognized the importance of training police about the seriousness of family abuse, and the necessity of providing guidance as to the decision to arrest.[72] However, in urban Honolulu, limited jail space coupled with a serious backlog in the courts makes it unlikely that batterers will face incarceration. This is not just a Hawai'i problem; it happens on the mainland as well. For example, in Milwaukee, Wisconsin, out of 8,000 misdemeanor arrests for household violence last year, only fifty percent were prosecuted, and of those prosecuted only thirty percent resulted in convictions.[73]

It seems clear that mandatory arrest statutes, if not part of a coordinated program, come "perilously close to encouraging greater jeopardy for victims unless accompanied by recommendations for massive changes in prosecutorial and judicial practices. In a judicial system which seldom tries spouse abuse offenders and rarely convicts them, women are seldom protected from violent reprisals."[74]

---

[68] Dunford, *supra* note 67. The Milwaukee project found that among employed men, arrest deterred repeated battering, resulting in a 16 percent decrease in recidivism. Among the unemployed, however, arrest increased repeat violence by 44 percent. *Id.*

[69] Goleman, *supra* note 68. *See also* Roger Worthington, *Value of Mandatory Arrest for Woman Beaters Questioned*, CHI. TRIB., Nov. 19, 1991, at C5 ("Mandatory arrest puts us in the moral dilemma of reducing violence against women who are relatively well off (living with or married to an employed assailant), at the price of increasing violence against women whose abusers are unemployed.") (quoting Professor Lawrence Sherman). *See* STRAUS, *supra* note 9, at 31.

[70] *See* STRAUS, *supra* note 9, at 31.

[71] Sherman & Berk, *supra* note 58, at 270.

[72] *See* Kim, *supra* note 1 (quoting Honolulu Police Chief Michael Nakamura).

[73] *World News Tonight*, *infra* note 81.

[74] Sarah F. Berk & Donileen R. Loseke, *"Handling" Family Violence: Situational Determinants of Police Arrest in Domestic Disturbances*, 15 LAW & SOC'Y REV. 317, 343

In 1981, Duluth, Minnesota became the first jurisdiction to enact a mandatory arrest policy for misdemeanor assaults.[75] A follow-up study documented that with this program in place, 87 percent of the victims going through their court system's domestic violence program were living violence-free three years later, meaning that the offenders had not committed new crimes.[76] The 47 percent decrease in recidivism in the Duluth program could not be traced solely to arrest, but rather to the coordinated effort of various agencies.[77] A key factor in both Duluth and Minneapolis was that the men who were arrested actually served time in jail.[78] Unless arrest results in conviction and punishment, it does not reliably deter further violence. Where punishment is certain, abusers quickly learn that the laws on the books are not empty threats, and violence drops. However, where an arrest is not accompanied by at least some amount of incarceration, the victim may be placed in an even more precarious position.[79] Unfortunately, that is the present situation in Hawai'i, where the abuser is unlikely to spend any time in jail following the arrest, and is therefore unlikely to be deterred from future acts of abuse.

C. No-Drop Policies

Victims are often reluctant to follow through with charges, because the abuser, through coercion, promises, or emotional ties, may force his victim to shield him from legal accountability.[80] A "no-drop" prosecutorial policy such as that in Hawai'i is a crucial part of a systematic program of deterring abuse, but it brings with it its own problems. Under a no-drop order, the victim can be arrested, jailed for contempt, and forced to pay court costs for failing to testify against the criminal who is still terrorizing her.[81] Thus, making the

---

(1980-81); *see also* Robert E. Worden & Alissa A. Pollitz, *Police Arrests in Domestic Disturbances: A Further Look*, 18 LAW & SOC'Y. REV. 105, 118 (1984) (announcing replication of the findings of the Berk & Loseke study).

[75] Hoffman, *supra* note 6, at 23.

[76] Buel Tape, *supra* note 8. *See also* Ellen Pence, *The Duluth Domestic Abuse Intervention Project*, 6 HAMLINE L. REV. 247, 258 (1983) (police had contact with only 16% of domestic assailants from the seven to twelve months after arrest).

[77] Sarah Mausolf Buel, *Recent Developments: Mandatory Arrest for Domestic Violence*, 11 HARVARD WOMEN'S L.J. 211, 216 (1988).

[78] Sherman & Berk, *supra* note 58, at 268.

[79] Sari Horwitz, *D.C. Police to Make Arrests in Domestic Violence Disputes: Cases to be Treated as Criminal Offenses*, WASH. POST, June 3, 1987, at A1, A7.

[80] Litsky, *supra* note 43, at 167; Pence, *supra* note 77, at 250.

[81] *See* Pence, *supra* note 76, at 260. "[T]he program offers safety for victims while providing abusers with clear limits on their behavior, certain intervention, and a more systematic program for the purpose of changing their behavior." *Id.* at 255-69. In Brooklyn, New York, prosecutors will drop charges at the victim's request only after the victim has had counseling. *Id.* Madison, Wisconsin, prosecutors will prosecute with or without the victim's

victim responsible for the prosecutor's job of pursuing justice can reward the batterer and reinforce his sense of power and immunity from legal consequences.[82] If the victims lack confidence that their attackers will be convicted, they may well be discouraged from coming forward in the first place. It is not enough that we in Hawai'i work in concert with the police, and encourage arrests and prosecutions; it is even more critical that we make it possible for our courts to handle the cases that the police and prosecutors bring to them.

IV. THE MIND OF A BATTERER

To understand how the Committee's proposal for early intervention at the petty misdemeanor level can help end battering, we must understand why the batterer batters.[83] Batterers tend to have a strong sense of entitlement;[84] their life experience has led them to believe that violence is justifiable to get what they want, and to maintain control of their family and household members.[85] Control is the batterer's life, and he typically feels entitled to batter when he feels out of control or powerless.[86] Overcoming this sense of entitlement, rather than reinforcing it, is the key to overcoming abuse.

The batterer shows a high capacity for planning, and an appreciation of cause and effect.[87] He may show this by putting the children in another room, so they won't hear, taking off his rings to avoid leaving scars, or only hitting areas that will be covered by clothing.[88] The man who attacks and injures family and household members does not beat up the police officer who gives him a speeding ticket, or the co-worker who makes him look bad, or the boss who yells at him for being late to work, because he knows full well that there

---

cooperation. *World News Tonight* (ABC television broadcast, June 27, 1994), *available in* LEXIS, News Library, File No. 4126-4.

[82] *See* David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 65 OHIO ST. L.J. 1153, 1215 n. 80, 244-51 (1995) (discussing the prosecutor's role in stopping spousal abuse).

[83] RENATA VASELLE-AUGENSTEIN & ANNETTE EHRLICH, MALE BATTERERS: EVIDENCE FOR PSYCHOPATHOLOGY IN INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 139, 144 (Emilio C. Viano ed., 1992).

[84] *See id.* at 139. *See also* BARBARA STAR, HELPING THE ABUSER: INTERVENING EFFECTIVELY IN FAMILY VIOLENCE 34-35 (1983), *cited in* Welch, *supra* note 3, at n.34.

[85] Buel Tape, *supra* note 8.

[86] VASELLE-AUGENSTEIN & EHRLICH, *supra* note 83, at 143.

[87] *Id.*

[88] Buel Tape, *supra* note 8.

would be serious repercussions if he did.[89] To put it bluntly, he chooses to use violence against his wife or girlfriend because he can do so with impunity.[90]

Asking why battered women stay is the wrong question; it is a bit like asking why a hostage or prisoner of war "chooses" to stay with his tormentor.[91] Even if it is possible to get away, leaving does not mean safety, and may trigger a fatal attack.[92] Rather than put the onus on victims to escape their tormentors, we should impress upon batterers at the earliest possible stage that their actions have consequences. This is the first step in changing their behavior.[93] Repeat offenses are significantly fewer where there is early intervention and a coordinated program leading to conviction.[94] In other words, the first step in reducing abuse is increasing the costs associated with battering. A coordinated program which intervenes at the first sign of violence has been shown to change the cost/benefit basis of battering without increasing the risks to the victim.[95] To be effective, such a policy cannot be isolated; it must exist as part of a fully integrated response to violence, combining mandatory arrest, police training, guidelines for judges and prosecutors, services for victims, and rehabilitation and counselling for batterers, giving the community, victims, assailants and children a clear message that battering is not acceptable "even" in the family.[96]

Sarah Buel, a Quincy, Massachusetts prosecutor specializing in household violence cases, has demonstrated that when the first "petty" misdemeanor carries consequences, batterers choose another option.[97] Buel grew up in a violent home, saw a brother murdered in connection with his involvement in gangs and drugs, and was herself a battered wife before becoming a prosecutor.[98] Her innovative leadership in pursuing early intervention into household violence won her community a $100,000 Ford Foundation Innovations Award

---

[89] *Id.*

[90] Welch, *supra* note 3, at 1138 (citing VASELLE-AUGENSTEIN & EHRLICH, *supra* note 84, at 140).

[91] *See* Dee L.R. Graham and Edna Rawlings, *Survivors of Terror: Battered Women, Hostages, and the Stockholm Syndrome, in* FEMINIST PERSPECTIVES ON WIFE ABUSE (Kerri Yllo & Michelle Bogard eds., 1988). Several researchers have applied the characteristics outlined by the Amnesty International "Report on Torture" (1973) to battered women. *See, e.g.*, Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response From Battered Women*, 68 FL. B.J. 24, 28 n.7 (Oct. 1994).

[92] Buel Tape, *supra* note 8.

[93] *Id.*

[94] Buel, *supra* note 77, at 216.

[95] Welch, *supra* note 3, at 1139-40.

[96] Pence, *supra* note 76, at 254-55.

[97] Buel Tape, *supra* note 8.

[98] *Id.*

for the Quincy Court Domestic Violence program.[99] She started the Quincy program after she recognized that mandatory arrest alone was not enough; she realized that the reason for Duluth, Minnesota and Seattle's 47 percent reduction in repeat domestic violence cases, and San Diego's 59 percent reduction in its domestic homicide rate, was that in these programs the arrests resulted in convictions.[100] The Quincy program shows that batterers choose another option when they know there will be consequences.[101]

Duluth, Minnesota's violence intervention program, focusing on the psychology of the batterer, showed remarkable success from the start, as 77 percent of those arrested for misdemeanor crimes of household violence pled guilty.[102] The program effectively shifted the focus of intervention from the victim to the assailant, and in so doing, "enhanced the ability of the system to deter assailants by increasing the numbers of assailants convicted of assault and establishing serious consequences for battering."[103] The costs of arrest are not solely financial, of course; they can include time in jail, shame, the risk of divorce or separation from their partners, and loss of a job.[104] Failure to arrest, on the other hand, tells the man that terrorizing and brutalizing "his" woman is not a crime and that he has nothing to fear if he beats the woman with whom he is, or was, involved.[105]

If we accept the overwhelming evidence that batterers batter by choice, and because the costs do not outweigh the rewards, we should expect this criminal behavior to decrease as the costs of committing it increase. In other words, we must intervene early enough and consistently enough to convince potential batterers not to engage in violence at all, and must teach batterers that what they are doing is wrong, illegal and will be punished.[106] Early intervention

---

[99] Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 338-63 (1994) (citing Patricia Nealon, *Quincy Antibattering Effort Gets Grant*, BOSTON GLOBE, Sept. 23, 1992, at 10) (Ford Foundation selected Quincy from 1600 contenders for its Innovations in State and Local Government Awards Program, including a $100,000 grant to duplicate the program nationwide).

[100] Buel Tape, *supra* note 8.

[101] *Id.*

[102] Pence, *supra* note 76, at 257-58.

[103] *Id.* at 269.

[104] Michael Steinman, *Coordinated Criminal Justice Interventions and Recidivism Among Batterers*, *in* WOMAN BATTERING: POLICY RESPONSES, 221, 222 (Michael Steinman ed., 1991).

[105] EVA JEFFERSON PATERSON, HOW THE LEGAL SYSTEM RESPONDS TO BATTERED WOMEN, *in* BATTERED WOMEN, 79, 82-83 (Donna M. Moore ed., 1979).

[106] Specific deterrence rationales focus on the individual who has already committed an act of violence, and seeks to discourage him from committing further criminal acts. Alan Wertheimer, *Criminal Justice and Public Policy: Statistical Lives and Prisoners' Dilemmas*, 33 RUTGERS L. REV. 730, 734 (1981) (goal of specific deterrence is to stop criminals from committing future crimes).

also provides a "quarantine" effect whereby punishment may prevent some crime simply by isolating the criminal from society.[107]

Abuse does not start with a fatal or crippling attack; it starts small, with a slap, or a push.[108] Battering is addictive, and if nothing happens to stop it, battering is progressive.[109] Domestic violence is not about "losing it; it is about power, control, coercion."[110] Batterers show higher-than-normal levels of possessiveness, jealousy, and paranoia in a clinical setting.[111] They demonstrate power and control by isolating their victim from friends, family, and community until the victim has nowhere to go, and no-one to turn to.[112] A man who batters typically will not allow "his woman" to make any independent decisions, and will want to know everything that she does.[113] The batterer may appear "nice, humorous, charming, and sensitive," outside the family circle while showing a "Jekyll and Hyde" personality at home.[114] He may appear guilty and contrite after he batters, but this is often a form of manipulation rather than an indicator of change.[115] A batterer may go so far as to establish a list of "offenses" for which "his woman" can expect a beating.[116] If confronted, he will explain that he slapped her because she burned the toast, or that he gave her a black eye because she flirted with the mailman.[117] This, however, is not uncontrollable rage; this is "premeditation in every sense of the word."[118]

---

[107] *Id.* at 734-35.

[108] *See, e.g.*, Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1885 (1996) (If the batterer is not held accountable for his actions, domestic violence generally increases in both severity and frequency). The author notes, "[B]atterers are generally repeat criminal offenders. 'Males who make a habit of assaulting their female partners may commit serious crimes in the home as frequently as other offenders with more serious criminal records do on the street.'" *Id.* at 1888.

[109] *Id.* Roni Young, Baltimore City State's Attorney and Director of the Domestic Violence Unit, notes: "It's not just Warren Moon. And it's not just O.J. [Simpson]. People ask me why society is in denial over this issue. They're not in denial. They're in acceptance — accepting of the one slap, the one punch, not realizing what it can escalate into . . . ." *Id.* at 1910 n.265.

[110] Buel Tape, *supra* note 8.

[111] VASELLE-AUGENSTEIN & EHRLICH, *supra* note 83, at 141, discussing the use of the Minnesota Multiphasic Personality Inventory (MMPI) test in understanding batterers' personalities.

[112] Michael Steinman, *Lowering Recidivism Among Men Who Batter Women*, 17 J. POLICE SCI. & ADMIN. 124 (1990).

[113] VASELLE-AUGENSTEIN & EHRLICH, *supra* note 83, at 142; *see also* STAR, *supra* note 84, at 34.

[114] *See* VASELLE-AUGENSTEIN & EHRLICH, *supra* note 83, at 146.

[115] Welch, *supra* note 3, at 1138-39 (citing VASELLE-AUGENSTEIN & EHRLICH, *supra* note 83, at 145).

[116] *Id.*

[117] *Id.*

[118] *Id.*

Why do we condone this carnage? At least part of the reason is that condonation of "wife abuse" has deep historical roots, so that it became news when law enforcement decided to treat it "as a crime."[119] In the mid-to-late 19th century, courts became somewhat less willing to give express approval of physical abuse,[120] but criminal prosecutions were rare until the 1970s, and there were few attempts to study the inadequacies of the existing legal and social responses.[121]

Our culture has tended to see household violence as a private concern; an attack on a member of the household was seen as a personal matter of a dysfunctional relationship, rather than as a vicious, violent crime committed by one citizen upon another. The view has been that "a man's home is his castle,"[122] and that police should stay out of "private" family matters.[123] Is it any wonder that those who prey on their family and household members may believe that they have the right to do so, and do not take seriously the risk of punishment?[124] By now it is clear that we must see domestic violence as

---

[119] *See* REPORT, *supra* note 1, at 2 (socialization of boys and girls leads directly to acceptance of violence against women; the view that men should dominate women and children, and that women and children should be punished when they resist domination is pervasive among batterers and many others in our community). *See also* Horwitz, *supra* at A1, A7. *See, e.g.*, Bradley v. State, 1 Miss. (1 Walker) 156, 158 (1824) (approving physical "chastisement" of wife by husband), *overruled by* Harris v. State, 14 So. 266 (1894); State v. Rhodes, 61 N.C. (Phil. Law) 291, 291 (1868) (husband who attacked wife did not commit battery, though his violence would have been battery if victim had not been his wife); State v. Black, 60 N.C. (Win.) 263, 263 (1864) (law will not interfere with a man's "right" to inflict physical punishment on his wife).

[120] *See* Fulgham v. State, 46 Ala. 143, 148 (Ala. 1871) (holding that husband and wife "may be indicted for assault and battery upon each other"). *See generally* Thurman v. City of Torrington, 595 F. Supp. 1521, 1528 (D. Conn. 1984) (giving history of law of spouse abuse).

[121] Barbara K. Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74, 80 (1983). *See* STRAUS, *supra* note 9, at 10.

[122] Welch, *supra* note 3, at 1145.

[123] *See* Litsky, *supra* note 43, at 162. Only recently have courts in most of the United States moved away from the express approval of inter-familial rape, striking down laws permitting a husband to rape his wife. *See, e.g.*, Merton v. State, 500 So. 2d 1301 (Ala. Crim. App. 1986) (marital exception to first-degree rape and sodomy statutes were unconstitutional under 14th amendment equal protection clause); People v. M.D., 595 N.E.2d 702 (Ill. 1992) (marital exemptions to criminal sexual assault statutes unconstitutional; right to marital privacy extends only to consensual marital relations); People v. Liberta, N.E.2d 567 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985). *But see, e.g.*, People v. Brown, 632 P.2d 1025 (Colo. 1981) (marital exception to rape statute does not create an arbitrary and irrational distinction and does not violate due process or equal protection) *cited with approval in* People v. Flowers, 644 P.2d 916 (Colo. 1982), *appeal dismissed*, 459 U.S. 803 (1982) (lack of substantial federal question); State v. Taylor, 726 S.W.2d 335 (Mo. 1987) (marital exception to non-forcible sexual offenses does not violate constitution).

[124] *Id.*

something that concerns us all. We cannot be silent and pretend that this is not happening in the families of Hawai'i.[125]

V. CONCLUSION

Despite our best efforts, abuse of family and household members remains a difficult and intractable problem with no easy solutions.[126] We must follow through on the efforts that have already been made by taking innovative steps to enable the courts to handle the cases that result from existing enforcement efforts. Even if we arrest, prosecute, and refuse to drop cases, our attempts will be a mockery unless we are able to send the batterers to jail.[127]

There is no doubt that the idea of reducing the classification of a battering offense carries a potent emotional symbolism. It is difficult not to feel, on an emotional level, that diminishing the maximum available sentence for first offenders somehow diminishes the importance of the crime. For this reason, the idea that "less is more" may challenge some of our preconceived notions about retribution and crime, but we need to rise to the challenge. We cannot let our desire to send a symbolic message overrule the demonstrated need for early intervention.[128]

We have all seen parents who constantly threaten their misbehaving children with dire punishments that the children know will not be carried out.

---

[125] *See* REPORT, *supra* note 1, at 3. The REPORT notes:

> The Hawai'i Crime Brief issued by the Attorney General in April 1996 found that nearly 30% of all homicides from 1985-1994 in the state were the result of domestic violence .... a study conducted by the Hawai'i State Commission on the Status of Women (1993) estimated that nearly 50,000 women in this state between the ages [of] 18 and 64 have been victims of domestic violence. The Department of Health's Plan for the Prevention of Injuries in Hawai'i (June 1995) reported that between 1989 and 1994 almost 100 women were killed by men in Hawai'i. Most of the killers were partners, boyfriends, or acquaintances.

Id. at 3. *See also* Buel Tape, *supra* note 8.

[126] *See* REPORT, *supra* note 1, at Summary (unpaginated) (Hawai'i passed its first spousal abuse law in 1972; all police jurisdictions in Hawai'i follow policies of mandatory arrest upon probable cause to believe abuse has occurred, yet between 1989 and 1992 almost 100 women in Hawai'i were killed by men, most by partners, husbands, boyfriends, or acquaintances).

[127] REPORT, *supra* note 1, at 20 (many persons arrested for HAW. REV. STAT. § 709-906 violations agree to plead to a lesser offense, usually HAW. REV. STAT. § 707-712 (assault in the third degree) and serve no jail time). *See also* Litsky, *supra* note 43, at 169-70. In 1986, Massachusetts District Court Judge Paul Heffernan scolded Pamela Dunn for "wasting his time" on domestic matters when she sought a safety order; the judge granted the order, but refused to order increased protection. Ms. Dunn's husband then kidnapped, shot, stabbed, and strangled her, and left her body in the town dump. *Court Challenged in Massachusetts*, N.Y. TIMES, Nov. 30, 1986, at A61.

[128] Buel Tape, *supra* note 8.

Not surprisingly, the children ignore the empty threats, and their behavior becomes more incorrigible. Why can't we recognize that the same principle applies to the somewhat infantile personality of the batterer? Why are we surprised when he repeats his behavior after not being punished for early, relatively mild offenses, before his behavior is ingrained and incorrigible — and before someone in his household dies?

The first slap or shove must result in serious consequences, or the abuse will escalate.[129] We lack the resources to attack crime fully and effectively on all fronts, but targeting family abusers for prosecution at the petty misdemeanor stage, before their behavior escalates to the point where a jury trial is called for, can help decrease not only household violence, but all of the crime and social ills that flow from it. We cannot ignore this problem until the violence escalates to the felony level, just to preserve the purely symbolic deterrent of the one year misdemeanor sentence.

It seems logical to assume that longer and harsher sentences would deter crime, especially on the part of family abusers, who in most cases are not otherwise career criminals, but as H.L. Mencken once noted, "for every problem, there is some solution that is simple, neat, and wrong."[130] The solutions of the past — upgrading offenses and tough mandatory sentences, seem simple and neat, but they are demonstrably wrong, because they carry within them a Catch-22 that prevents their being carried out. Get-tough measures may send a symbolic message to the electorate that their elected officials are "tough" on crime, but when the batterer knows that the "tough" sentence is an empty threat, there is no deterrence. The symbolic message is lost in the bloody reality. Unless the defendant believes that the punishment is highly certain to be imposed, symbolic statutory punishments are a cruel joke on the victims.[131]

It is unfortunate that any proposal to reduce domestic violence penalties is seen by some victims' advocates as symbolizing a lack of support for victims of violence.[132] However, if we have it in our power to improve the deterrent value of the law by imposing the mandatory 48 hours and discretionary month of imprisonment upon first offenders more swiftly and more predictably,[133]

---

[129] REPORT, *supra* note 1, at 1 ("physical abuse is part of a continuum that typically begins with actions that undermine self-esteem, escalating verbal assaults, and attempts to isolate a victim from friends and family . . . . In most situations, the physical violence increases in severity and frequency over time").

[130] Frank Daily, *Preserve the Lawyer's Tools*, 7 A.B.A.J. (Feb. 1986) 38, 40 (quoting H.L. Mencken).

[131] Steinman, *supra* note 104, at 222.

[132] Notes from Penal Code Commission deliberations, *supra* note 26 (comments of Nanci Kriedman, Victims' Advocate). *See also infra* Appendix B.

[133] *Id.*

and if we instead choose symbols over substance, that is a true failure to support those victims. As things stand now, abusers are getting the message that their actions have no consequences.[134] The present law creates the paradoxical result that more assailants are freed than punished, and teaches these violent men that attacking others is acceptable, as long as it is "only" a member of the family or household.

We should ask ourselves what message it sends to have a one-year sentence on the books for a first offense, when there is virtually no chance of actually receiving it. Even if Hawai'i's courts could cease trying any other kind of case but household violence, it would take an increase of 10 percent more courts, judges, and staffs, costing millions more tax dollars, to eliminate permanently the backlog in domestic cases,[135] and that would undoubtedly create a backlog in the prosecutions of other serious crimes, such as murder, rape and robbery.

There is no way around this dilemma as long as a first offense without serious injury remains a full misdemeanor and qualifies for a jury trial. One could reasonably conclude that the present law's deterrent effect is nil, as evidenced by the high recidivism rate of these offenders. If we can change our responses to family terrorism from the symbolic to the practical, we can expect to see some real success in curbing *all* forms of crime in Hawai'i by cutting it off at the source: the violent family.

It is time to stop clinging to symbols — we need results. To achieve this we must look beyond our cherished preconceptions and get-tough rhetoric and try to understand what does and doesn't work. If we don't attempt some real solutions, we are not only abandoning our children, but we are colluding with the batterers. We are ensuring that they get the message that this behavior will be tolerated, and that we will maintain a system that ensures that there are no consequences as long as the violence is "only" in the family.

---

[134] Notes from Penal Code Commission deliberations, *supra* note 26 (comments of Office of the Public Defender). *See also infra* Appendix B (many cases dismissed because of backlog).

[135] Notes from Penal Code Commission deliberations, *supra* note 26.

Appendix A: Committee to Conduct Comprehensive Review of the Hawai'i Penal Code's Proposed Changes to Selected Sections of the Hawai'i Revised Statutes

Part II. ABUSE OF FAMILY OR HOUSEHOLD MEMBERS

§ 709-910. Definitions of terms in this part. In this part, unless a different meaning is plainly required, "family or household members" means spouses or former spouses, parents, children, and persons jointly residing or formerly residing in the same dwelling unit.

§ 709-911. Duty of police in investigation of abuse of family or household members.

(1) the police, in investigating any complaint of abuse of a family or household member, may, upon request, transport the abused person to a hospital or safe shelter.
(2) Any police officer may, with or without a warrant, arrest a person if the officer has probable cause to believe that the person is physically abusing, or has physically abused, a family or household member.
(3) Any police officer who arrests a person pursuant to this part shall not be subject to any civil or criminal liability; provided that the police officer acts in good faith, upon reasonable belief, and does not exercise unreasonable force in effecting such arrest.

§ 709-912. Abuse of family or household members; penalty.

(1) A person commits the offense of abuse of family or household members if the person intentionally, knowingly, or recklessly physically abuses a family or household member.
(2) A person who commits the offense of abuse of a family or household member shall be sentenced as follows:
    (a) For a first offense, to a one-year term of probation with a mandatory condition of imprisonment of not less than forty-eight hours and not more than thirty days; and
    (b) For any subsequent offense which occurs within five years of a previous offense which resulted in a conviction under this section, to a one-year term of probation with a mandatory condition of imprisonment of not less than thirty days and not more than one year.
(3) Whenever a court sentences a person pursuant to subsection (2), it shall also require that the offender undergo any available domestic violence treatment and appropriate program(s) ordered by the court. The court may suspend any portion of the term of imprisonment imposed, except for the required minimum period of imprisonment under subsection 2(a) and (b) upon the condition that the defendant remain conviction-free and complete any court-ordered treatment and

counseling. Upon a finding of good cause, the court may grant early discharge from probation.

(4) If a person is ordered by the court to undergo any treatment or counseling, that person shall provide adequate proof of compliance with the court's order. The court shall order a subsequent hearing at which the person is required to make an appearance, on a date certain, to determine whether the person has completed the ordered treatment. The court may waive the subsequent hearing and appearance where a court officer has established that the person has completed the treatment ordered by the court.

§ 709-913. Safety order; refusal to comply; penalty.

(1) Any police officer, with or without a warrant, may take the following course of action where the officer has reasonable grounds to believe that there was recent physical abuse inflicted by one person upon a family or household member, whether or not such physical abuse occurred in the officer's presence:

(a) The police officer may make reasonable inquiry of the family or household member upon whom the officer believes recent physical abuse has been inflicted, and of other witnesses as there may be;

(b) Where the police officer has reasonable grounds to believe that there is probable danger of further physical abuse being inflicted by one person upon a family or household member, the police officer may lawfully order the person to leave the premises for a period of twenty-four hours; provided that the person is allowed to enter the premises with police escort to collect any necessary personal effects;

(c) Where the police officer makes the finding referred to in (b) and the incident occurs after 12:00 p.m. on any Friday, or on any Saturday, Sunday, or legal holiday, the order to leave the premises shall commence immediately and be in full force but the twenty-four hour period shall be enlarged and extended until 4:30 p.m. on the first day following the weekend or legal holiday;

(d) All persons who are ordered to leave as stated above shall be given a written warning citation stating the date, time, and location of the warning and stating the penalties for violating the warning. A copy of the warning citation shall be retained by the police officer and attached to a written report which shall be submitted in all cases. A third copy of the warning citation shall be given to the abused person; and

(e) If the person so ordered refuses to comply with the order to leave the premises or returns to the premises before the expiration of the safety period, the person shall be placed under arrest.

(2) A person commits the offense of refusal to comply with a safety order when the person refuses to comply with the lawful order of a police officer under this section. The person shall be sentenced as follows:
   (a) For any offense not preceded within a one-year period by a conviction under this section, to a one-year term of probation with a mandatory condition of imprisonment of not less than forty-eight hours and not more than thirty days; and
   (b) For any subsequent offense which occurs within one year of a previous conviction under this section, to a one-year term of probation with a mandatory condition of imprisonment of not less than thirty days, and not more than one year.

(3) Whenever a court sentences a person pursuant to subsection (2), it shall also require that the offender undergo any available domestic violence treatment and appropriate program(s) ordered by the court. The court may suspend any portion of the term of imprisonment imposed, except for the required mandatory minimum period of imprisonment under subsection (2)(a) and (b), upon the condition that the defendant not engage in conduct that would constitute an offense under this part and complete any court-ordered treatment and counseling. Upon a finding of good cause, the court may grant early discharge from probation.

(4) An offender shall provide adequate proof of compliance with any order of the court entered pursuant to subsection (3). The court shall order a subsequent hearing at which the person is required to make an appearance, on a date certain, to determine whether the person has completed the ordered treatment. The court may waive the subsequent hearing and appearance where a court officer has established that the person has completed the treatment ordered by the court.

§ 709-914. Rights of the family or household member.

(1) A family or household member who alleges physical abuse by another person may petition the family court, with the assistance of the prosecuting attorney of the applicable county, for a penal summons or arrest warrant to issue forthwith, or may file a criminal complaint through the prosecuting attorney of the applicable county.

(2) When the respondent is taken into custody pursuant to an arrest warrant, the respondent shall be brought before the family court at the first possible opportunity. The court may then dismiss the petition or hold the respondent in custody subject to bail. Where the petition is not dismissed, a hearing shall be set.

(3) This section shall not operate as a bar against prosecution under any other section of this Code in lieu of prosecution under this part.

(4) It shall be the duty of the prosecuting attorney of the applicable county to assist any complainant under this section in the preparation of the penal summons or arrest warrant.

(5) This section shall not preclude the physically abused family or household member from pursuing any other remedy under law or in equity.

§ 709-915. Expungement. If the offense committed under this part is the only crime committed by the defendant for a period of not less than ten years, the person may apply for an order to expunge from all official records all recordation relating to the person's arrest, trial, and finding of guilt.

Appendix B: Committee to Conduct Comprehensive Review of the Hawai'i Penal Code Committee Commentary

Some of the amendments to the household member abuse offense are purely formal, as in the creation of a new Part II, which will heighten the visibility of this law. The proposed definition of "family or household members" in § 709-910, for example, differs in no substantial way from the definition of the same term currently contained in the second paragraph of § 709-906(1). But having a separate definition section, with its own title, has two advantages: (1) It conforms the formulation of this offense to the model used throughout the Hawaii Penal Code; *see e.g.*, §§ 701-118, 703-300, 707-700, 708-800, and 712-1240; and (2) it facilitates recognition and location of this provision by users and researchers, and thus makes the law more accessible. The same can be said of proposed §§ 709-911 (compare existing § 709-906[136] (1), (2), (3), and (7), 709-913 (1)) (compare existing § 709-906 (8), (9), (10), (11), and (12), and 709-915) (compare existing § 709-906 (13)). The expungement provision of proposed § 709-915 requires ten years of abuse-free behavior which represents a doubling of the current period of qualification for expungement.

The significant changes to current law are in proposed §§ 709-912 and 709-913 (2), the punishment provisions for household member abuse and refusal to comply with a police officer's safety order. Current law classifies all instances of these offenses as misdemeanors, even though the mandatory jail sentence for first offenders is only 48 hours. The committee proposes, in §§ 709-912 and 709-913, to specify the punishment for first offenders as "a one-year term of probation with a mandatory condition of imprisonment of not less than forty-eight hours and not more than thirty days." The current mandatory 48 hours of imprisonment is thus retained, the real difference being that the proposal caps the available discretionary imprisonment for first offenders at 30 days, whereas the current misdemeanor classification, *see* § 706-663,[137] envisions possible imprisonment for up to one year. The reasons for the shift from one year to 30 days are (1) that the amendments will have little or no effect on the lengths of sentences actually imposed on first offenders, and (2) the amendment will eliminate the right to jury trial, reduce (if not eliminate) the backlog of household member abuse cases awaiting jury trials, and thus enable the Family Court efficiently to administer the law in this area.

There is no need to retain first-offense household member abuse at the misdemeanor level. Imprisonment sentences in excess of 30 days are extremely rare, bearing in mind that cases involving any substantial degree of bodily injury are prosecuted as assaults under §§ 707-710 or 707-711.[138] Indeed, the committee has learned that 95 percent of the sentences for § 709-906 convictions are for the minimum 48 hours of imprisonment. First

---

[136] *See* text of HAW. REV. STAT. § 706-906, *infra* Appendix D.

[137] *See* text of HAW. REV. STAT. § 706-663, *supra* note 24.

[138] *See* text of HAW. REV. STAT. §§ 707-710, 707-711, *infra* Appendix D.

offenders whose abuse does not physically injure their victims do not deserve more than 30 days imprisonment. What counts is the mandatory 48 hours, and the proposal wisely retains this deterrent feature of existing law. The result of this analysis is that the current misdemeanor classification is functionally unnecessary, and therefore offers no benefit to balance the enormous cost occasioned by jury demands and clogged court calendars.

As this comment is written, efforts are being made to reduce the number of household member abuse cases awaiting jury trials in O`ahu's family court, but every week occasions an average of 40 to 50 more jury trial demands. Existing and foreseeable judicial resources are inadequate to adjudicate these cases; in consequence, many cases are dismissed for want of speedy trials, pled to other charges in order to avoid the mandatory 48 hours. Defense counsel cannot be faulted for seeking jury trials in a system that guarantees jury trials. Nor can the Judiciary be faulted for giving priority to murder and other serious felony cases. Nor should the Legislature be faulted if it opts to solve the problem by reclassifying the crime so as to eliminate a penalty — on the books but never employed — that, because of sheer availability, triggers the right to jury trial.

Another key feature of this proposal is the mandatory sentencing of first offenders and repeat offenders to one year of probation, which will facilitate the imposition and completion of the treatment programming that is mandated by §§ 709-912(3) and 709-913(3).

Repeat offender sentencing is unaffected by this proposal, except that a mandatory one-year term of probation is added to the mandatory 30 days imprisonment.

This proposal will encounter opposition, not because of reduction in punishment, but because of fears that the symbolism of an apparent downward reclassification will somehow mark us all as having failed to support the victims of domestic violence. But the proposal is designed to improve the deterrent efficacy of the law by imposing the mandatory 48 hours and discretionary month of imprisonment upon first offenders more swiftly and with more predictability. And it will surely do that. What better way to combat the problem we rightly deplore than with actual punishment administered promptly?

The committee's ch. 709 proposal should be read in connection with its recommendation that a fourth degree assault offense at the petty misdemeanor level, see proposed § 707-712.5, and consisting of the "physical abuse" of another person, be established by the Legislature. The intent is to achieve symmetry between the ordinary assault and household member abuse sections, and thus to avoid even an implication that the code views domestic violence more permissively than other forms of interpersonal assault.

Appendix C: Proposed Amendment to Hawai'i Revised Statutes § 707-712.5

The Committee proposed the following additional provision to bring non-family assaults in line with assaults on family and household members:

§ 707-712.5 Assault in the fourth degree.

(1) A person commits the offense of assault in the fourth degree if the person intentionally, knowingly, or recklessly physically abuses another person.
(2) Assault in the fourth degree is a petty misdemeanor.

Comment:

The intent is to achieve parity between the lowest assault offense and the crimes against household members, see ch. 709, Part II, (proposed). Since there seems to be no good reason to treat either of these groups of victims differently from the other, the proposed fourth degree assault offense parallels the constitutionally "petty" abuse of household member offense, § 709-912 (proposed). The intent is that cases construing "physical abuse" in the ch. 709 context, *e.g.*, *State v. Laborde*, 71 Haw. 53, 781 P.2d 1041 (1989) (dictum that hitting another person constitutes "physical abuse"); *State v. Kameenui*, 69 Haw. 620, 753 P.2d 1250 (1988) (punching in the face and shoving against a wall); *State v. Garcia*, 9 Haw. App. 325, 839 P.2d 530 (1992) (hitting in face), be applicable here as well.

Appendix D: Selected Current Sections of the Hawai`i Revised Statutes

§ 134-7.5 Seizure of firearms in domestic abuse situations; requirements; return of.

(a) Any police officer who has reasonable grounds to believe that a person has recently assaulted or threatened to assault a family or household member may seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of the offense. The police officer may seize any firearms or ammunition that are in plain view of the officer or were discovered pursuant to a consensual search, as necessary for the protection of the officer or any family or household member. Firearms seized under this section shall be taken to the appropriate county police department for safekeeping or as evidence.

(b) Upon taking possession of a firearm or ammunition, the officer shall give the owner or person who was in lawful possession of the firearm or ammunition a receipt identifying the firearm or ammunition and indicating where the firearm or ammunition can be recovered.

(c) The officer taking possession of the firearm or ammunition shall notify the person against whom the alleged assault or threatened assault was inflicted of remedies and services available to victims of domestic violence, including the right to apply for a domestic abuse restraining order.

(d) The firearm or ammunition shall be made available to the owner or person who was in lawful possession of the firearm or ammunition within seven working days after the seizure when:
   (1) The firearm or ammunition are not retained for use as evidence;
   (2) The firearm or ammunition are not retained because they are possessed illegally;
   (3) The owner or person who has lawful possession of the firearm or ammunition is not restrained by an order of any court from possessing a firearm or ammunition; and
   (4) No criminal charges are pending against the owner or person who has lawful possession of the firearm or ammunition when a restraining order has already issued.

§ 586-4 Temporary restraining order.

(a) Upon petition to a family court judge, a temporary restraining order may be granted without notice to restrain either or both parties from contacting, threatening, or physically abusing each other, notwithstanding that a complaint for annulment, divorce, or separation has not been filed. The order may be granted to any person who, at the time such order is granted, is a family or household member as defined in section 586-1 or who filed a petition on behalf of a family

or household member. The order shall enjoin the respondent or person to be restrained from performing any combination of the following acts:

(1) Contacting, threatening or physically abusing the petitioner(s);
(2) Contacting, threatening or physically abusing any person(s) residing at the petitioner(s)'s residence;
(3) Telephoning the petitioner(s);
(4) Entering or visiting the petitioner(s)'s residence; or
(5) Contacting, threatening or physically abusing the petitioner(s) at work.

(b) The family court judge may issue the ex parte temporary restraining order orally, if the person being restrained is present in court. The order shall state that there is probable cause to believe that a recent past act or acts of abuse have occurred, or that threats of abuse make it probable that acts of abuse may be imminent. The order shall further state that the temporary restraining order is necessary for the purpose of preventing acts of abuse, or a recurrence of actual domestic abuse, and assuring a period of separation of the parties involved. The order shall describe in reasonable detail the act or acts sought to be restrained. Where necessary, the order may require either or both of the parties involved to leave the premises during the period of the order, and may also restrain the party or parties to whom it is directed from contacting, threatening, or physically abusing the applicant's family or household members. The order shall not only be binding upon the parties to the action, but also upon their officers, agents, servants, employees, attorneys, or any other persons in active concert or participation with them. The order shall enjoin the respondent or person to be restrained from performing any combination of the following acts:

(1) Contacting, threatening or physically abusing the petitioner(s);
(2) Contacting, threatening or physically abusing any person(s) residing at the petitioner(s)'s residence;
(3) Telephoning the petitioner(s);
(4) Entering or visiting the petitioner(s)'s residence; or
(5) Contacting, threatening or physically abusing the petitioner(s) at work.

(c) When a temporary restraining order is granted pursuant to this chapter and the respondent or person to be restrained knows of the order, violation of the restraining order is a misdemeanor. A person convicted under this section shall undergo treatment or counseling at any available domestic violence program as ordered by the court. The court shall additionally sentence a person convicted under this section as follows:

(1) For a first conviction for violation of the temporary restraining order the person shall serve a mandatory minimum jail sentence of forty-eight hours;

(2) For the second and any subsequent conviction for violation of the temporary restraining order the person shall serve a mandatory minimum jail sentence of thirty days.

The court may suspend any jail sentence, except for the mandatory sentences under paragraphs (1) and (2), upon condition that the defendant remain alcohol and drug-free, conviction-free or complete court-ordered assessments or counseling. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor.

§ 586-11 Violation of an order for protection.

Whenever an order for protection is granted pursuant to this chapter, a respondent or person to be restrained who knowingly or intentionally violates the order for protection is guilty of a misdemeanor. The court shall sentence a violator to appropriate counseling and shall sentence a person convicted under this section as follows:

(1) For a first conviction for violation of the order for protection:
   (A) That is in the nature of non-domestic abuse, a violator may be sentenced to a jail sentence of forty-eight hours;
   (B) That is in the nature of domestic abuse, a violator shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours;

(2) For a second conviction for violation of the order for protection:
   (A) That is in the nature of non-domestic abuse, and occurs after a first conviction for violation of the same order that was in the nature of non-domestic abuse, a violator shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours;
   (B) That is in the nature of domestic abuse, and occurs after a first conviction for violation of the same order that was in the nature of domestic abuse, a violator shall be sentenced to a mandatory minimum jail sentence of not less than thirty days;
   (C) That is in the nature of non-domestic abuse, and occurs after a first conviction for violation of the same order that was in the nature of domestic abuse, a violator shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours, unless the court, in writing, finds that the violation does not warrant a jail sentence and provides the reasons for its decision;
   (D) That is in the nature of domestic abuse, and occurs after a first conviction for violation of the same order that is in the nature of

non- domestic abuse, a violator shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours;

(3) For any subsequent violation that occurs after a second conviction for violation of the same order for protection, the court shall impose a mandatory minimum sentence of not less than thirty days imprisonment.

The court may suspend any jail sentence under subparagraphs (1)(A) and (2)(C), upon appropriate conditions such as that the defendant remain alcohol and drug-free, conviction-free, or complete court-ordered assessments or counseling. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor offense. All remedies for the enforcement of judgments shall apply to this chapter.

§ 707-710 Assault in the first degree.

(1) A person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person.

(2) Assault in the first degree is a class B felony.

§ 707-711 Assault in the second degree.

(1) A person commits the offense of assault in the second degree if:
   (a) The person intentionally or knowingly causes substantial bodily injury to another;
   (b) The person recklessly causes serious bodily injury to another person;
   (c) The person intentionally or knowingly causes bodily injury to a correctional worker, as defined in section 710-1031(2), who is engaged in the performance of duty or who is within a correctional facility;
   (d) The person intentionally or knowingly causes bodily injury to another person with a dangerous instrument; or
   (e) The person intentionally or knowingly causes bodily injury to an educational worker who is engaged in the performance of duty or who is within an educational facility. For the purposes of this section, "educational worker" means any administrator, specialist, counselor, teacher, or employee of the department of education, or a person who is a volunteer in a school program, activity, or function that is established, sanctioned, or approved by the department of education or a person hired by the department of education on a contractual basis and engaged in carrying out an educational function.

(2) Assault in the second degree is a class C felony.

§ 709-906 Abuse of family and household members; penalty.

(1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member, or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member may, upon request, transport the abused person to a hospital or safe shelter.

For the purposes of this section, "family or household member" means spouses or former spouses, parents, children, and persons jointly residing or formerly residing in the same dwelling unit.

(2) Any police officer may, with or without a warrant, arrest a person if the officer has reasonable grounds to believe that the person is physically abusing, or has physically abused, a family or household member, and that the person arrested is guilty thereof.

(3) A police officer who has reasonable grounds to believe that the person is physically abusing, or has physically abused, a family or household member shall prepare a written report.

(4) Any police officer, with or without a warrant, may take the following course of action where the officer has reasonable grounds to believe that there was recent physical abuse or harm inflicted by one person upon a family or household member, whether or not such physical abuse or harm occurred in the officer's presence:

(a) The police officer may make reasonable inquiry of the family or household member upon whom the officer believes recent physical abuse or harm has been inflicted and other witnesses as there may be;

(b) Where the police officer has reasonable grounds to believe that there is probable danger of further physical abuse or harm being inflicted by one person upon a family or household member, the police officer may lawfully order the person to leave the premises for a cooling off period of twenty-four hours; provided that the person is allowed to enter the premises with police escort to collect any necessary personal effects;

(c) Where the police officer makes the finding referred to in (b) and the incident occurs after 12:00 p.m. on any Friday, or on any Saturday, Sunday or legal holiday, the order to leave the premises shall commence immediately and be in full force but the twenty-four hour period shall be enlarged and extended until 4:30 p.m. on the first day following the weekend or legal holiday;

(d) All persons who are ordered to leave as stated above shall be given a written warning citation stating the date, time, and location of the warning and stating the penalties for violating the warning. A copy of the warning citation shall be retained by the police officer and attached to a written report which shall be

submitted in all cases. A third copy of the warning citation shall be given to the abused person; and

(e) If the person so ordered refuses to comply with the order to leave the premises or returns to the premises before the expiration of the cooling off period, the person shall be placed under arrest for the purpose of preventing further physical abuse or harm to the family or household member; and

(f) The police officer may seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of an offense under this section.

(5) Abuse of a family or household member, and refusal to comply with the lawful order of a police officer under subsection (4) are misdemeanors and the person shall be sentenced as follows:

(a) For the first offense the person shall serve a minimum jail sentence of forty-eight hours; and

(b) For a second offense and any other subsequent offense which occurs within one year of the previous offense the person shall be termed a "repeat offender" and serve a minimum jail sentence of thirty days.

(6) Whenever a court sentences a person pursuant to section 709-906(5), it shall also require that the offender undergo any available domestic violence treatment and counseling programs ordered by the court. However, the court may suspend any portion of a jail sentence, except for the mandatory sentences under section 709-906(5)(a) and (5)(b), upon the condition that the defendant remain arrest-free and conviction-free or complete court ordered counseling.

(7) Any police officer who arrests a person pursuant to this section shall not be subject to any civil or criminal liability; provided that the police officer acts in good faith, upon reasonable belief, and does not exercise unreasonable force in effecting such arrest.

(8) The family or household member who has been physically abused or harmed by another person may petition the family court, with the assistance of the prosecuting attorney of the applicable county, for a penal summons or arrest warrant to issue forthwith, or may file a criminal complaint through the prosecuting attorney of the applicable county.

(9) The respondent shall be taken into custody and brought before the family court at the first possible opportunity. The court may then dismiss the petition or hold the respondent in custody, subject to bail. Where the petition is not dismissed, a hearing shall be set.

(10) This section shall not operate as a bar against prosecution under any other section of this Code in lieu of prosecution for abuse of a family or household member.

(11) It shall be the duty of the prosecuting attorney of the applicable county to assist any victim under this section in the preparation of the penal summons or arrest warrant.

(12) This section shall not preclude the physically abused or harmed family or household member from pursuing any other remedy under law or in equity.

(13) Upon dismissal of such person and discharge of the proceeding against the person under this section, such person, if the offense is the only offense against the other family or household member for a period of not less than five years, may apply for an order to expunge from all official records all recordation relating to the person's arrest, trial, finding of guilt, and dismissal and discharges pursuant to this section. If the court determines, after hearing, that such person was dismissed and the proceedings against the person were discharged and that no other similar offenses were charged against the person for a period of not less than five years, it shall enter such order.

(14) If a person is ordered by the court to undergo any treatment or counseling, that person shall provide adequate proof of compliance with the court's order. The court shall order a subsequent hearing at which the person is required to make an appearance, on a date certain, to determine whether the person has completed the ordered treatment. The court may waive the subsequent hearing and appearance where a court officer has established that the person has completed the treatment ordered by the court.